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No. 85-717

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Cross-Petitioners,

v.

BARCLAYSAMERICAN/CREDIT, INC.,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the absence of a contractual term requiring the giving of the 30-day notice results in the debtor's having no enforceable right to receive the 30-day notice prior to foreclosure, repossession or acceleration even though such a requirement is specifically imposed by DIDMCA and 12 C.F.R. § 590.4(h)?

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BRIEF IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Cross-Respondent herein, respectfully prays that this Court deny the Respondents' Cross-Petition For Writ of Certiorari.

Opinions Below

BarclaysAmerican incorporates herein its statement of the Opinions Below in its Petition For Writ Of Certiorari filed in Case No. 85-541.

Jurisdiction

BarclaysAmerican incorporates herein its statement of the Jurisdiction in its Petition For Writ Of Certiorari filed in Case No. 85-541.

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1. Cross-Respondent's parent corporations in reverse order are BarclaysAmericanCorporation, Barclays U.S. Holdings Inc., Barclays USA Inc., Barclays Bank PLC and Barclays PLC. Cross-Respondent's successor by merger is BarclaysAmerican/Financial, Inc.

The Respondents' Cross-Petition For Writ Of Certiorari was received by BarclaysAmerican's Counsel of Record, Douglas N. Campbell, Esq., on October 29, 1985. This Brief In Response To Cross-Petition For Certiorari is presented for filing within 30 days of the receipt of the Cross-Petition For Writ Of Certiorari pursuant to Rules 22 and 28.2 of this Court.

Statutory Provisions And Regulations Involved

BarclaysAmerican incorporates herein its statement of the Statutory Provisions And Regulations Involved in its Petition For Writ Of Certiorari filed in Case No. 85-541.

Statement Of The Case

BarclaysAmerican incorporates herein its statement of the Statement Of The Case in its Petition For Writ Of Certiorari filed in Case No. 85-541.

REASONS FOR GRANTING THE CROSS-PETITION FOR WRIT OF CERTIORARI

I. This Court Should Grant Both The Petition And Cross-Petition For Writ of Certiorari.

This Court should grant the Cross-Petition For Writ Of Certiorari filed by the Quillers in this case — not because this Court should reverse the first holding of the Eleventh Circuit that the 30-day notice is not required to be disclosed in the sales contract under § 501 of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"] and 12 C.F.R. § 590.4(h), and not because of the reasons stated by the Quillers in their Cross-Petition. Rather, this Court should grant *certiorari* because neither side is satisfied with the result below, and creditors, consumers, the courts and the Federal Home Loan Bank Board [hereinafter the "FHLBB" and the "Board"] are all confused as to what the Eleventh Circuit majority's opinion really means.

On the one hand, the Quillers are not satisfied because they apparently would prefer that the broadest possible construction be given to DIDMCA and the regulations so as to require that the right to the 30-day notice *must* be contained in the sales contract itself. This construction would provide the easiest theory for future plaintiff-debtors to proceed under and, in all likelihood, would increase the number of sales contracts which would violate the purported requirement, thereby increasing the potential number of lawsuits which may be filed. For example, since the filing of BarclaysAmerican's Petition For Writ of Certiorari, one of the same lawyers representing the Quillers in this case has filed yet another class action based on similar allegations of violations of DIDMCA and the regulations.[2] Thus, it is apparent that debtors will continue to bring actions against creditors until it is made clear that the 30-day notice provision need not be contained in the contract and that 12 C.F.R. § 590.4(h) can only be violated by failure actually to give the prescribed notice upon the debtor's default at least 30 days before taking any action to repossess, accelerate or foreclose.

On the other hand, BarclaysAmerican is not satisfied with the second holding of the Eleventh Circuit. As stated in BarclaysAmerican's Petition For Writ Of Certiorari, the initial holding is the correct construction of DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) and is consistent with the views of the General Counsel of the FHLBB as expressed in the October 28, 1982, opinion letter issued by the

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2. *Dinkins v. First Carolina Finance Corporation*, Case No. CV185-241, United States District Court for the Southern District of Georgia, Augusta Division, was filed on October 15, 1985. Actually, two of the three co-counsel for the plaintiff in the *Dinkins* case are also co-counsel in this case and in the companion case, *Grant v. General Electric Credit Corporation*, on Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Case No. 85-584. The *Dinkins* case makes a total of eight class actions pending against six different creditors involving a number of common issues of law and fact, including the principal issue in involved in BarclaysAmerican's petition.

FHLBB's General Counsel, Thomas P. Vartanian, 5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983) [hereinafter the "Vartanian Letter"]. Appendix J[3] However, the Eleventh Circuit panel majority and a 6-5 majority of the Eleventh Circuit sitting *en banc* went astray by failing to stop at that point. Instead, the Eleventh Circuit created a rule of construction under which a sales contract must be examined to determine whether it contains a term "authorizing conduct *contrary* to the [preemption] statute or regulations," thereby losing preemptive status. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067, 1072 (11th Cir. 1984). Appendix B at B-7 (emphasis original).

II. A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.

— In their perhaps most startling statement in this litigation to date, the Quillers argue that under general rules of American law and Uniform Commercial Code [hereinafter "UCC"] Section 9-503, the debtor's right to receive the 30-day notice under § 501(c) of DIDMCA and 12 C.F.R. § 590.4(h) is unenforceable "UNLESS OTHERWISE PROVIDED IN THE CONTRACT." Cross-Petition For Writ Of Certiorari, p. 4 (emphasis original). The reasoning of the Quillers is, however, fallacious, as the following discussion will demonstrate.

The Quillers argue that under O.C.G.A. § 11-9-503, there is no requirement that a secured party must provide notice prior to repossession of collateral, "[u]nless otherwise agreed." Taken alone, this is a correct statement of the law

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3. Appendix to the Petition For Writ Of Certiorari filed in Case No. 85-541. Citations to portions of a particular appendix will be as follows: "App. ___ at ___.".

under the Georgia UCC. The Quillers then leap to the conclusion that a debtor would have no enforceable right to the 30-day notice required by DIDMCA and 12 C.F.R. § 590.4(h) unless the notice was required by a term in the contract. That conclusion, however, simply does not follow from the Quillers' premise.

O.C.G.A. § 11-9-503 does not address the situation in which another statute or regulation requires such a notice to be given. To argue that § 11-9-503 requires that the 30-day notice must be a contracted term and that a federally required notice provision would be nugatory if the parties did not contract therefor is really to argue the astonishing proposition that O.C.G.A. § 11-9-503 (1962) prospectively preempts DIDMCA (1983) and 12 C.F.R. § 590.4(h) with regard to the issue of the 30-day notice. This reasoning is simply incorrect because nothing in O.C.G.A. § 11-9-503 precludes the applicability of a statutorily required notice provision and, in any event, federal law would preempt state law under the Supremacy Clause of the United States Constitution.[4]

In fact, the general rule of law, contrary to the Quillers' assertions, is that the law, including regulations, in effect at the time and place of contracting is incorporated into the contract as if the law were expressly referred to in the contract's terms. *Maryland-National Capital Park and Planning Commission v. Lynn*, 514 F.2d 829 (D.C. Cir. 1975); *Rehart v. Clark*, 448 F.2d 170 (9th Cir. 1971); *Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783 (1947). There are numerous examples in Georgia of statutorily required notice provisions which operate independently of the contracts

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4. The Quillers' citations to additional authorities in their Cross-Petition do not support their argument. 75 A.L.R. 3rd 1061 (1977) and 29 A.L.R. Fed. 418 address the constitutionality of the self-help repossession provision of Section 9-503 of the UCC and do not consider the impact of another applicable statute. 69 Am. Jur. 2d., Secured Transactions, § 598, does not discuss the impact of another statute on UCC § 9-503.

which they may affect and which do not have to be contained in the contract in order for a debtor to acquire an enforceable right to the notice. *E.g.*, O.C.G.A. § 11-9-504(3) (requires that after repossession of the collateral, notice of any public sale, private sale or other intended disposition must be made); O.C.G.A. § 11-9-505 (if the debtor has paid less than 40% of the cash price and the secured party proposes to retain the collateral in satisfaction of the obligation, written notice of such proposal must be sent to the debtor); O.C.G.A. § 10-1-36 (a notice of the creditor's intention to pursue a deficiency claim must be sent to the debtor ten days after repossession in order to recover a deficiency judgment under the GMVSFA); and O.C.G.A. § 44-14-162.2 (requires a fifteen days notice prior to foreclosure of a real property security deed). There are numerous cases enforcing these notice provisions, and we find not a single one where a contract provision affirming the right to notice was a factor in the decision. More importantly, we do not find a single case where it was argued, seriously or not, that the absence of such a contract provision "took away" the right to notice which the legislature had bestowed. The Quillers' view, if adopted, would represent a radical change in American jurisprudence on this subject which is totally unwarranted.

In the case cited by the Quillers, *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978), the Georgia Supreme Court was presented with the narrow issue of whether the debtor was entitled to notice upon acceleration and foreclosure in the absence of a term in the contract requiring the notice. The Court of Appeals had twice before found that, under the terms of the Georgia Motor Vehicle Sales Finance Act [hereinafter "GMVSFA"] sales contract under consideration, notice to the debtor prior to repossession was required, not statutorily, but because of certain language in the contract. The Supreme Court disagreed, holding that, strictly as a matter of contractual construction, "the seller had not contracted away the right *under law, to repossess without first giving notice.*" 245 S.E.2d at

296 (emphasis original). No statutorily required repossession notice provision was discussed by the *Hunt* court and apparently none applied. Thus, the *Hunt* case is limited to the situation in which no statute, state or federal, imposes a duty of notice prior to repossession upon the creditor and simply holds that, under O.C.G.A. § 11-9-503, if no notice was contracted for, none is required to be given.

Finally, the Quillers argue that the FHLBB's *amicus curiae* briefs are merely "*post hoc* rationalizations" and should not be considered by this Court. BarclaysAmerican has responded to this argument in its Brief In Reply To Respondents' Opposition To Petition For Writ of Certiorari at Section III and simply incorporates that discussion herein. In their Cross-Petition, the Quillers place additional reliance for this proposition on *Securities Industry Association v. Board of Governors*, 468 U.S. ___, 82 L.Ed.2d 107 (1984), in arguing that the Vartanian Letter is also a "*post hoc* rationalization." That case involved a change in the position of the Federal Reserve Board's general counsel at the trial of the case. However, the Vartanian Letter was issued by the FHLBB's General Counsel approximately four months before the Quillers filed suit in this case and the FHLBB *adopted* his position in the Eleventh Circuit; therefore, *Securities Industry Association* has no application here.

The Quillers contend that the 30-day notice provision and all other requirements under the regulations must be contained in the contract in order to make the creditor "choose" to proceed under DIDMCA at the time the sales contract is executed. Regardless of whether DIDMCA imposes such a requirement, the Quiller sales contract clearly specifies in the lower left-hand corner of the front and back page thereof that it is a "FEDERAL PREEMPTION CONTRACT" and contains everything that the regulations require. BarclaysAmerican's Petition For Writ Of Certiorari, p. 4 and Appendix I, filed in Case No. 85-541.

In summary, the Quillers' argument that the 30-day notice is a "contract for" requirement, BarclaysAmerican's

Petition For Writ Of Certiorari, p. 20, is logically unsupportable and, further, is not required by DIDMCA or 12 C.F.R. § 590.4(h).

III. Conclusion

In conclusion, BarclaysAmerican/Credit, Inc. respectfully requests that this Court grant BarclaysAmerican's Petition For Writ Of Certiorari and does not oppose the grant of the Quillers' Cross-Petition For Writ Of Certiorari in this case for the purposes and reasons set forth above and in its other briefs in Case No. 85-541.

Respectfully submitted,

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Dated: November 27, 1985